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6 IN THE UNITED STATES DISTRICT COURT
7 FOR THE DISTRICT OF ARIZONA

8 Holliday Fenoglio Fowler, L.P.,

No. CV-15-01180-PHX-SPL

9 Plaintiff,

ORDER

10 vs.

11 L'Auberge Newco, LLC,

12 Defendant.
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15 Before the Court are the parties' Cross Motions for Summary Judgment. (Docs.
16 50, 53.) For the reasons set forth below, Defendant's Motion for Summary Judgment
17 (Doc. 50) is granted.

18 **I. Factual Background¹**

19 Plaintiff Holliday Fenoglio Fowler, L.P. ("HFF") is a financial services provider
20 for the commercial real estate industry (Doc. 54, ¶ 1), and Defendant L'Auberge Newco,
21 LLC ("LAN") owns and operates the L'Auberge de Sedona Resort and Spa ("L'Auberge
22 Resort"), a luxury hotel in Sedona, Arizona. (Doc. 51, ¶ 1.) Defendant LAN's affiliate—
23 non-party Orchards Newco, LLC ("ON")—owns and operates the Orchards Inn, which is
24 adjacent to the L'Auberge Resort. (Doc. 51, ¶ 3.) IMH Financial Corporation ("IMH") is
25 the sole member and manager of both Defendant LAN and non-party ON. (Doc. 51, ¶ 4.)
26 Although the exact circumstances under which Plaintiff became aware of Defendant's

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28 ¹ The following facts are taken from the parties' statements of facts and are not
disputed unless noted.

1 need to refinance a loan on the L'Auberge Resort are disputed, the parties entered into a
2 contract on August 22, 2014 (henceforth, "the agreement"). (Doc. 51, ¶ 11; Doc. 54, ¶
3 17.) Under the terms of the agreement, Plaintiff would serve as Defendant's "exclusive
4 representative for the purpose of arranging financing" during the exclusivity period
5 beginning August 22, 2014 and ending on October 30, 2014. (Doc. 51-6, ¶ 1.) Absent
6 written notice to the contrary from either party, Plaintiff would continue to serve as
7 Defendant's exclusive representative after October 30, 2014 on a month-to-month basis.
8 (Doc. 51-6, ¶ 1.) As its exclusive financial intermediary, Defendant would refer all
9 finance sources interested in refinancing Defendant's loan to Plaintiff. (Doc. 51-6, ¶ 1.)
10 With regard to compensation for Plaintiff, the agreement reads, in part:

11 [Defendant] shall pay the Fee (as defined below) to [Plaintiff]
12 only in the event a financing of the Property . . . closes (a) at
13 any time during the Exclusivity Period, (b) at any time
14 following the Exclusivity Period in the event such financing
15 closes pursuant to any letter of intent, term sheet, application
16 or commitment issued during the Exclusivity Period or (c) at
any time during the Tail Period [defined as the six months
following the expiration of the Exclusivity Period].

17 (Doc. 51-6, ¶ 2.) The agreement defined the fee as "0.75% of the final aggregate
18 negotiated loan amount." (Doc. 51-6, ¶ 2.)

19 During the exclusivity period, Plaintiff referred nearly fifty potential financing
20 sources to Defendant. (Doc. 51, ¶ 19; Doc. 54, ¶ 30.) The record reflects that Defendant
21 did not execute an agreement with any of the financing sources referred by Plaintiff
22 during the initial exclusivity period. (Doc. 51, ¶ 28; Doc. 61, ¶ 28.) In mid-October,
23 Plaintiff became aware from potential financing sources that another entity—Cushman &
24 Wakefield ("Cushman")—was also attempting to secure financing for IMH assets,
25 including the L'Auberge Resort loan. (Doc. 54, ¶ 34; Doc. 59, ¶ 34.) When contacted by
26 Plaintiff regarding Cushman, Defendant explained that Cushman was working to secure
27 financing for other IMH assets, but were specifically told not to include the L'Auberge
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1 Resort loan. (Doc. 59, ¶ 34.)

2 On November 25, 2014, Defendant sent Plaintiff an e-mail that read, in its
3 entirety, as follows: “Looks like we area [sic] hitting all dead ends [sic] I would say.”
4 (Doc. 51, ¶ 31; Doc. 61, ¶ 31.) Later that afternoon, Defendant informed Plaintiff that it
5 had received favorable terms from a financing source, but did not disclose the name of
6 the financing source to Plaintiff at that time. (Doc. 51, ¶ 8; Doc. 54, ¶ 41.) Three days
7 later, Defendant received a term sheet from Karlin Real Estate, LLC (“Karlin”) in
8 response to Defendant’s inquiry to serve as a financing source for IMH’s assets,
9 including the L’Auberge Resort loan. (Doc. 51, ¶ 36.) While the record is unclear as to
10 whether Defendant ultimately executed the refinancing of the loan with Karlin or one of
11 its subsidiaries, and what IMH assets were used to secure the loan, both Plaintiff and
12 Defendant agree that Defendant executed a \$50,000,000 loan—which included the
13 L’Auberge Resort loan—in early spring 2015. (Doc. 51, ¶ 41; Doc. 54, ¶ 47.)

14 On March 5, 2015, Plaintiff sent Defendant an invoice for \$375,000—the fee to
15 which Plaintiff believed itself to be entitled to under the exclusivity agreement with
16 Defendant. (Doc. 51, ¶ 47; Doc. 54, ¶ 50.) Plaintiff did not receive payment from
17 Defendant. (Doc. 54, ¶ 51.) Plaintiff filed the present suit against Defendant for breach of
18 contract, breach of good faith, and alternatively, unjust enrichment. (Doc. 1.) Defendant
19 and Plaintiff have filed Cross Motions for Summary Judgment. (Docs. 50, 53.)

20 **II. Standard of Review**

21 A court shall grant summary judgment if the pleadings and supporting documents,
22 viewed in the light most favorable to the non-moving party, “show[] that there is no
23 genuine dispute as to any material fact and the movant is entitled to judgment as a matter
24 of law.” Fed. R. Civ. P. 56(a); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23
25 (1986). Material facts are those facts “that might affect the outcome of the suit under the
26 governing law.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A genuine
27 dispute of material fact arises if “the evidence is such that a reasonable jury could return a
28 verdict for the nonmoving party.” *Id.*

1 The party moving for summary judgment bears the initial burden of informing the
2 court of the basis for its motion and identifying those portions of the record, together with
3 affidavits, which it believes demonstrate the absence of a genuine issue of material fact.
4 *Celotex*, 477 U.S. at 323. If the movant is able to do such, the burden then shifts to the
5 non-movant who, “must do more than simply show that there is some metaphysical doubt
6 as to the material facts,” and instead must “come forward with ‘specific facts showing
7 that there is a genuine issue for trial.’” *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*,
8 475 U.S. 574, 586-87 (1986). At this stage, the function of the judge is “not himself to
9 weigh the evidence and determine the truth of the matter but to determine whether there
10 is a genuine issue for trial.” *Anderson*, 477 U.S. at 249; *see also Scott v. Harris*, 550 U.S.
11 372, 380 (2007).

12 **III. Discussion**

13 **A. Breach of contract claim**

14 In determining whether Defendant breached its agreement with Plaintiff, Arizona
15 law governs.² *Geico Gen. Ins. Co. v. Tucker*, 71 F.Supp.3d 985, 987 (D. Ariz. 2014)
16 (“Where a federal court has jurisdiction by virtue of diversity of citizenship of the parties,
17 the court must follow state law.”). Under Arizona law, a breach of contract claim requires
18 a plaintiff to demonstrate “(1) the existence of a contract, (2) the breach of the contract,
19 and (3) resulting damages.” *Cavan v. Maron*, 182 F.Supp.3d 954, 960 (D. Ariz. 2016)
20 (citing *Chartone, Inc. v. Bernini*, 207 Ariz. 162, ¶ 30, 83 P.3d 1103, 1111 (App. 2004)).
21 Damages must be “reasonably certain,” the certainty of which “is provided where the
22 plaintiff devises some reasonable method of computing his net loss.” *Hubbard v. Shelton*,
23 No. CV-08-623-TUC-DCB, 2011 WL 13183092, at *8 (D. Ariz. 2011) (internal citations
24 omitted). Moreover, it is well settled that “conjecture or speculation cannot provide the
25 basis for an award of damages.” *Id.*

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28 ² Neither party disputes that Arizona law is controlling. (Doc. 50 at 3; Doc. 53 at 4.)

1 As a preliminary matter, it is first necessary for the Court to address the scope of
2 the agreement for purposes of the present Cross Motions for Summary Judgment.
3 Plaintiff argues on summary judgment—for the first time—that the conduct of both
4 parties is evidence that Plaintiff was to serve as the exclusive representative for the entire
5 “Sedona Portfolio,” which included both the L’Auberge Resort loan and non-party ON’s
6 assets, including the Orchards Inn through either a (1) a separate implied contract or (2)
7 the incorporation of implied terms to the agreement. (Doc. 53 at 10-12.) The Court will
8 not entertain this argument because new issues may not be raised for the first time at the
9 summary judgment stage. *Russell v. Pac. Motor Trucking Co.*, 672 F. App’x. 629, 631
10 (9th Cir. 2016); *WildEarth Guardians v. Jewel*, 134 F.Supp.3d 1182, 1194 n.65 (9th Cir.
11 2015). Thus, the Court will only look to the agreement between the parties as it was
12 memorialized in writing on August 22, 2014.

13 To prevail, Plaintiff must prove the existence of a contract, breach, and resulting
14 damages. Because Plaintiff has not met its burden of setting forth facts that demonstrate
15 to reasonable certainty that it would be entitled to damages, Plaintiff’s breach of contract
16 claim fails as a matter of law. Assuming for the purposes of the present Cross Motions
17 for Summary Judgment that Defendant breached its agreement with Plaintiff, Plaintiff has
18 set forth no facts that would allow a reasonable juror to find that Plaintiff experienced
19 any damages as a result of the breach. As of November 25, 2014—the date on which
20 Defendant informed Plaintiff of Karlin’s proposed loan terms—Plaintiff had yet to
21 provide Defendant with a single lender that Defendant deemed acceptable and Plaintiff
22 was still negotiating terms with at least five potential financial sources. Moreover,
23 Plaintiff has failed to set forth any evidence that explains how the \$375,000 fee
24 calculated by Plaintiff takes into consideration the fact that Defendant’s ultimate loan
25 with Karlin included several IMH assets, not just the L’Auberge Resort loan. By failing
26 to present any evidence demonstrating that it suffered damages—an essential element of
27 the cause of action—Plaintiff’s claim fails as a matter of law.
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1 **B. Breach of implied covenant of good faith and fair dealing claim**

2 In Arizona, all contracts contain “an implied covenant of good faith and fair
3 dealing in every contract.” *Coulter v. Grant Thornton, LLP*, 241 Ariz. 440, ¶ 30, 388 P.3d
4 834, 842 (App. 2017) (internal citation omitted). This implied covenant is violated when
5 a party “acts in a manner that denies the other party ‘the reasonably expected benefits’ of
6 the contract.” *Id.* (citing *FL Receivables Tr. 2002-A v. Ariz. Mills, L.L.C.*, 230 Ariz. 160,
7 ¶ 41, 281 P.3d 1028, 1037 (App. 2012)). Damages for breach of covenant of good faith
8 and fair dealing are measured as ordinary contract damages. *United Dairymen of Ariz. v.*
9 *Schugg*, 212 Ariz. 133, ¶ 21, 128 P.3d 756, 762 (App. 2006) (internal citation omitted). A
10 party’s failure to set forth evidence that would allow it to prevail on a breach of contract
11 claim precludes recovery on a claim for breach of an implied covenant of good faith and
12 fair dealing. *See id.* Because Plaintiff has failed to set forth facts to support its breach of
13 contract claim, Plaintiff’s claim for breach of implied covenant of good faith and fair
14 dealing claim also fails as a matter of law.

15 **C. Unjust enrichment claim**


16 Under Arizona law, a claim for unjust enrichment requires a plaintiff to show an
17 “enrichment connected with an impoverishment and the absence of both justification and
18 a legal remedy.” *Johnson v. KB Home*, 720 F.Supp.2d 1109, 1122 (D. Ariz. 2010) (citing
19 *Trustmark Ins. Co. v. Bank One, Ariz., NA*, 202 Ariz. 535, ¶ 34, 48 P.3d 485, 492 (App.
20 2002)). Unjust enrichment claims may not be brought where “a specific contract governs
21 the parties’ relationship.” *Id.* Because neither party disputes the validity of the agreement,
22 Plaintiff’s claim for unjust enrichment fails as a matter of law.

23 **IV. Conclusion**

24 By failing to set forth facts that demonstrate damages, Plaintiff’s claims for breach
25 of contract and breach of implied covenant of good faith and fair dealing fail as a matter
26 of law. Plaintiff’s claim for unjust enrichment also fails as matter of law because the
27 conduct of the parties is governed by the August 22, 2014 agreement. Accordingly,
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- Dated this 20th day of November, 2017.


Honorable Steven P. Logan
United States District Judge